MINTZ LEVIN

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202-434-7300
202-434-7400 fax
www.mintz.com

Tara M. Corvo | 202 434 7359 | tmcorvo@mintz.com

July 19, 2013

DRAFT

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Ex Parte; Revision of the Commission's Program Access Rules, MB Docket No. 12-68

Dear Ms. Dortch:

On July 17, 2013, Catherine Carroll, Vice President, Public Policy, Discovery Communications ("Discovery") and the undersigned met with Michelle Carey, Kathryn Berthot and Steven Broeckaert of the Media Bureau, and Susan Aaron of the Office of General Counsel, to discuss the above-captioned proceeding. Specifically, Ms. Carroll expressed Discovery's strong concerns about the impact of proposals to expand the program access rules by changing the definition of "buying group," allowing distributors to automatically opt in to any master agreement negotiated by a buying group, and to consider a buying group automatically "comparable" to an MVPD with the same number of subscribers as the group potentially can deliver.

There has been no evidentiary showing of any anticompetitive behavior on the part of cable-affiliated programmers that would justify any expansion of the program access requirements. ACA's proffered explanation that its requested changes merely reflect programmers' everyday business practice is both legally insufficient to justify a rule change and bears no relation to whether or not a programmer is affiliated with a cable operator.

Cable-affiliated programmers already compete on an unequal playing field, against networks not subject to program access rules, and should not be placed at any further competitive disadvantage. Expanding the rules to give additional entities program access rights would give newly covered entities additional leverage in distribution negotiations, because both would know that the programmer could not walk away from the negotiation and would not want to face a complaint. There is no justification for the Commission to intrude into business relationships that by all appearances are working well without regulatory oversight.

In addition, giving any distributor the automatic right to opt-in to a buying group agreement would have a significant adverse impact on cable-affiliated programmers' ability and incentive to invest in programming and manage cash flow. First, programmers generally seek to stagger their affiliation agreement expirations. Doing so mitigates the risks of being dropped by multiple operators simultaneously and of losing a significant percentage of distribution at any one time.

Second, having staggered expiration dates for carriage agreements provides ongoing opportunities to revalue the network and its programming in the marketplace. Programmers invest in programming with the goal of growing audiences, expecting the opportunity to recoup this investment through higher affiliation fees when existing deals expire. If a distributor with an expiring deal could automatically opt into the remaining years of a buying group deal, it would deprive programmers of the opportunity they bargained for to revisit the rates, terms and conditions based on the then-current market for their programming. There is no reason that cable-affiliated programmers should have to accept the below-market rates that would result from a right of automatic opt-in when their unaffiliated programmer competitors do not.

Finally, buying groups should not be considered automatically “comparable” to an individual MVPD offering the same number of subscribers. There are many legitimate factors that programmers consider when negotiating a carriage arrangement, such as the markets served by the distributor, tier of carriage, or other support offered. There is also a very meaningful difference between a buying group offering a potential subscriber universe and an MVPD committing to deliver a programmer to a specified number of actual systems and subscribers. Two MVPDs would not be considered comparable if each were not committing to the same number of subscribers; there is no reason that buying groups should get special treatment when they stand in the place of an MVPD.

Pursuant to section 1.1206(b) of the Commission’s rules, an electronic copy of this letter is being filed with the Office of the Secretary and served electronically on the Commission participants in the meeting.

Respectfully submitted,

/s/

Tara M. Corvo

cc: Michelle Carey
Kathryn Berthot
Steven Broeckaert
Susan Aaron